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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ /930

No. ~~629~~ 53

DAVID BURNET

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLINGHAM LOAN AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1930
CERTIORARI GRANTED APRIL 14, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLINGHAM LOAN AND TRUST COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A [Caption omitted.]

B

C

1 Before United States Board of Tax Appeals

Docket Number 18224

WILLINGHAM LOAN AND TRUST COMPANY, PETITIONER

versus

COMMISSION OF INTERNAL REVENUE

For Taxpayer: C. R. Dawson and J. C. Murphy, Esqs.
For Commissioner: A. S. Lisenby, Esq.

Docket entries

1926
Jul. 3. Petition received and filed.
Jul. 7. Copy of petition served on Solicitor.
Jul. 7. Notification of receipt mailed taxpayer.
Jul. 13. Motion for 120 days extension to file answer filed by solicitor.
Aug. 4. Granted. Both sides notified.
1927
Jan. 3. Answer filed by G. C.
Jan. 22. Copy of answer served on taxpayer—Gen. Cal.
1928
Jul. 11. Hearing date set 11-28-28.
Aug. 8. Order placing on Cal. of 9-12-28 for hearing at Atlanta, Ga. entered.
Sept. 5. Application for subpœna of A. R. Willingham, Pres. filed by G. C.
Sept. 5. Subpœna issued.
Sept. 12. Hearing had before Mr. Trussell on merits. Submitted on stipulation of facts read into record. Briefs due 11-20-28.
Oct. 15. Transcript of hearing 9-12-28 filed see 18223.
Oct. 25. Order granting extension to 12-15-28 to both parties to file brief—entered.
2 Nov. 1. Brief filed by G. C.
Dec. 13. Brief filed by taxpayer.
1929
Mar. 18. Findings of fact and opinion rendered Mr. Trussell. Judgment will be entered for respondent.
Mar. 22. Decision entered.
Jun. 29. Petition for review by U. S. Cir. Ct. of Appeal (5) with assignments of error filed by taxpayer.

1929

Jun. 29. Præcipe filed.

Jul. 25. Proof of service of petition for review and praecipe filed.

Now, August 7, 1929, the foregoing docket entries certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed Jul. 3, 1926

The above-named petitioner hereby petitions for a redeter-
3 mination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:E:SM-60D HLJ, dated May 5, 1926, and as a basis of this proceeding alleges as follows:

1. That petitioner is a corporation with principal office at 461 Third Street, Macon, Georgia.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A" was mailed to the petitioner on May 5, 1926.

3. Bond has been filed with, and approved by, the collector of internal revenue as provided in the revenue act of 1926, section 279 (f) within 10 days from the receipt of said deficiency notice.

4. The taxes in controversy are income and profits taxes for the taxable years ended May 31, 1920 and May 31, 1921, as asserted by the commissioner, but for the calendar years 1920 and 1921 as claimed by the petitioner herein, and are as follows:

Fiscal year ended May 31, 1920	$2,887.95
Fiscal year ended May 31, 1921	276.82

5. The determination of the taxes set forth in the said notice of deficiency is based on the following errors:

(a) The commissioner has incorrectly determined the net income and invested capital of petitioner on the basis of the fiscal years
4 closed May 31, 1920 and May 31, 1921, the determination being incorrect in that original returns were filed on the basis of the calendar years in question, and the accounts having been kept so that income and invested capital could be determined upon the calendar year basis.

(b) The commissioner has erred in that he has attempted to assess, and has assessed, taxes upon the determined net income of this petitioner, although the assessment of same was barred by the reason of the statute of limitations.

(c) The Commissioner of Internal Revenue has incorrectly determined net income in that he has deferred items of credit while

the records of the taxpayer are kept upon a basis of receipts and disbursements, and the original returns were filed on that basis.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The business in which this taxpayer is engaged is that of buying and selling real estate and lending money for interest.

(b) The original tax returns field by the petitioner for the calendar year 1919 were filed on or before March 15, 1920—original tax returns for the calendar year 1920 were filed on or before March 15, 1921—original returns for the calendar year 1921 were filed on or before March 15, 1922.

(c) The net income for the calendar year 1920 was $16,529.82; the net income for the calendar year 1921 was $18,996.14.

(d) The invested capital for the calendar year 1921 is $222,325.89; the invested capital for the calendar year 1921 is $228,806.74.

(e) The records of this petitioner were kept on a basis of
5 receipts and disbursements, and the original returns were filed on the same basis. The records were so kept that net income and invested capital can be redetermined on the basis of calendar year.

(f) The petitioner had not procured permission from the Commissioner of Internal Revenue to change the basis of his accounting period, and was therefore required to file returns on the basis of calendar year, which was the basis of prior returns.

7. The petitioner prays for relief from the deficiency as asserted by the respondent on the following and each of the following particulars:

(a) That the assessment of any additional tax for any part of the 12 months ended December 31, 1919, be declared null and void as being barred by the statute of limitations, same having been assessed after more than 5 years had expired from the date the original returns were filed in the office of the collector of internal revenue, Atlanta, Georgia.

(b) That the net income and invested capital of taxpayer be redetermined on the basis of the calendar years 1920 and 1921 and the tax redetermined in accordance therewith.

(c) That petitioner have such other and further relief as the evidence and the law may warrant and petitioner prays that this board may hear and redetermine the deficiency herein alleged.

Respectfully,

(Signed) C. R. DAWSON,
C. R. DAWSON,
(Signed) J. C. MURPHY,
J. C. MURPHY,
Counsel for Petitioner,
1023 Wynne Claughton Bldg., Atlanta, Georgia.

6 [*Duly sworn to by A. R. Willingham; jurat omitted in printing.*]

Exhibit "A" to petition, Sheet No. 1

TREASURY DEPARTMENT,
Washington, May 5, 1926.

IT:E:SM-60 D
HLJ
WILLINGHAM LOAN & TRUST CO.,
Macon, Georgia.

SIRS: In accordance with the provisions of section 279 (a) of the revenue act of 1926, there has been assessed against you an income and profits tax amounting to $3,164.77 for the taxable years ended May 31, 1921, the details of which are set forth in the attached statement.

7 In accordance with the provisions of section 274 (a) of the same act, you are allowed sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter within which to file a petition with the United States Board of Tax Appeals, contesting in whole or in part the correctness of this determination.

Respectfully,

D. H. BLAIR.
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Enclosure.
Statement.
Form 882.

Statement

Exhibit A, sheet No. 2

IT:E:SM-60D
HLJ

In Re: Willingham Loan & Trust Co., Macon, Georgia.

Fiscal year ended May 31, 1920—Tax assessed, March special 12 list, page 0, line 1	$2,887.95
Fiscal year ended May 31, 1921—Tax assessed, March special 12 list, page 0, line 0	276.82

The total tax liability of $5,820.14 for the fiscal year ended May 31, 1920, and $2,402.29 for the fiscal year ended May 31, 1921, of which you were advised in bureau letter dated October 8, 1925, and January 9, 1926, are therefore sustained.

If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals

8 on the enclosed Form A, and forward it to the Commissioner

of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D-HLJ. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Now, August 7, 1929, the foregoing petition certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[SEAL.]

Before United States Board of Tax Appeals

Answer

Comes now the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, general counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Admits the allegations contained in paragraph 4 of the petition.

5. (a), (b) & (c). Denies that the commissioner erred in the
9 determination of the tax assessed against the petitioner as set out in commissioner's letter dated May 5, 1926, and specifically denies that he erred in the manner set out in subdivisions (a), (b), and (c), of paragraph 5 of the petition.

6. (a) & (b) Admits the allegations contained in subdivisions (a) and (b), of paragraph 6 of the petition.

Re: Willingham Loan & Trust Co.

6. (c), (d), & (e). Denies the allegations contained in subdivisions (c), (d), and (e), of paragraph 6 of the petition.

(f) Admits that the petitioner had not procured permission from the Commissioner of Internal Revenue to change the basis of its accounting period, but denies the remaining allegations contained in subdivision (f), of paragraph 6, and says that it was a consistent practice of the petitioner to close its accounts annually on May 31, and thereby established a fiscal year as of that date.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

Of counsel:

DONALD D. SHEPPARD,
Special Attorney, Bureau of Internal Revenue.

DDS/mvb

Now August 7, 1929, the foregoing answer certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

10 Before United States Board of Tax Appeals

Willingham Loan & Trust Co., petitioner v. Commissioner of Internal Revenue, respondent

Findings of fact and opinion. Promulgated March 18, 1929

Fiscal years. The petitioner corporation, having kept its books and closed its accounts annually as of May 31st of each of the years 1920 and 1921, was required by sections 212 (b) and 232 of the revenue act of 1918 and of the same sections of the revenue act of 1921 to make its income and profits tax returns on the basis of such fiscal years.

Statute of limitations. The petitioner corporation, keeping its accounts on a fiscal-year basis, but making returns on a calendar year basis, the applicable statutes of limitations begin to run on the day following the filing of its last calendar year return covering a portion of its fiscal-year period. Paso Robles Mercantile Co., 12 B. T. A. 750, followed. Jeopardy assessments made on the day five or four years respectively from the day on which return was filed are timely made and such assessments having been timely made on March 15, 1926, may be collected at any time within six years from the date of assessment. Revenue Act of 1926, section 278 (d).

J. C. Murphy, Esq., and C. R. Dawson, Esq., for the petitioner.

A. S. Lisenby, Esq., for the respondent.

The deficiencies involved in this action are (1) for a fiscal year ended May 31, 1920, $2,887.95, and (2) for a fiscal year ended May 31, 1921, $276.82. In its original petition the petitioner alleged error on the part of the respondent in computing taxable income and also that the assessment and collection of any deficiencies for the
11 periods named is barred by the statute of limitations. At the trial all issues other than the statute of limitations were waived, and it was agreed that in the event the board should find that the assessment and collection of deficiencies for the periods named were not barred by the statutes of limitations the amounts of the deficiencies were as computed by the respondent.

Findings of fact

The petitioner is a corporation organized under the laws of the State of Georgia on or about June 27, 1909, and has been since that time continuously engaged in the business of real estate and real-estate loans and at some time prior to the year 1918 the petitioner had established the practice of keeping its books of account on the

cash receipts and disbursements basis, of taking off trial balances and trade statements at the end of each month, and of closing and ruling down its books of account annually as of May 31st of each year. The petitioner had no properties requiring the keeping or making of inventories and the monthly trial balances reflected the petitioner's financial condition at the end of each month.

The petitioner had, however, consistently made its income and profits tax returns on the basis of calendar years, preparing the same from its monthly trial balances. Its calendar-year return for the year 1919 was filed with the collector of internal revenue of the district of Georgia on March 13, 1920. Its calendar-year return for the year 1920 was filed with the same collector on March 15, 1921, and its calendar-year return for the year 1921 was filed with the same collector on March 15, 1922. On or about April 1, 1924, the
12 petitioner was called upon by internal revenue officers to make its income and profits tax returns on the basis of its fiscal year ending May 31st, and on that date the petitioner caused to be prepared corporation income and profits tax returns for the fiscal year ended May 31, 1920, and for the fiscal year ended May 31, 1921, and filed the same in the office of the collector of internal revenue for the district of Georgia on April 3, 1924, designating said returns as amended returns.

On March 15, 1926, the respondent made jeopardy assessments of deficiencies for the said fiscal periods ended May 31, 1920, and 1921, and thereafter on May 5, 1926, mailed to the petitioner notice of such assessments in accordance with the provisions of section 279 (a) and (b) of the revenue act of 1926, and on June 28, 1926, petitioner filed with the board its petition for a redetermination of such deficiencies.

Opinion

TRUSSELL:

The record of this action establishes the fact that during all the times herein referred to the petitioner had an established practice of keeping its accounts and closing its books on the basis of a fiscal year ending May 31st of each calendar year, although it had been equally consistent in making income-tax returns on the basis of calendar years. Such calendar-year returns were proper and lawful returns for all the years prior to the year 1918. The revenue act of 1918, however, required corporations to make income-tax returns upon the same basis on which their books of account were kept. Revenue act of 1918, sections 212 (b) and 232. The petitioner should have changed its practice of making returns from the calendar-year basis to its fiscal-year basis when it made its returns for the
13 year 1918, and not having done so, the respondent properly required it to make such change for the periods here under consideration.

For the time included in its fiscal year ended May 31, 1920, the petitioner's calendar year returns were filed on March 13, 1920, and March 15, 1921. For the time included in its fiscal year ended May 31, 1921, the petitioner's calendar year returns were filed on March 15, 1921, and March 15, 1922. In the cases of Paso Robles Mercantile Co., 12 B. T. A. 750, and Lowenstein Bros. Garment Co., 13 B. T. A. 446, the board has held that the statute of limitations began to run upon the date of the filing of the last calendar year return covering the period of time included in the respective fiscal years, and applying the rule of those cases to the instant case the period within which assessments might be made for the fiscal year ended May 31, 1920, would not begin to run until March 16, 1921, and for the period ended May 31, 1921, the statute would not begin to run until March 16, 1922. As to the first period, the five-year period of the statute of limitations (act of 1918, section 250 (d) and act of 1926, section 277 (a) (3) would thus not expire until the close of the day of March 15, 1926, and as to the second fiscal period the four-year period of the statute of limitations (act of 1921, section 250 (d) and act of 1926, section 277 (a) (2) would not expire until the close of the day of March 15, 1926. Elliott National Bank v. Gill, 210 Fed. 933, and the cases of B. R. Weaver, 4 B. T. A. 15; Mrs. D. S. Smith, 4 B. T. A. 385, and Kellogg Commission Co., 6 B. T. A. 771. It thus appears that the jeopardy assessments made on March 15, 1926, were made within the statutory periods of limitation applicable to the several fiscal years involved in this action.

The jeopardy assessments involved in this case were made by the commissioner on March 15, 1926, and pursuant to the provisions of section 279 (a) and (b) of that act. These paragraphs of section 279 provide as follows:

14 (a) If the commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the commissioner shall mail a notice under such subdivision within 60 days after the making of the assessment.

The above-quoted provisions of section 279 are in addition to and qualification of section 274 (a) of the same act and we are of the opinion that the making of the jeopardy assessments within the period of the applicable statutes of limitations, the sending of notice of such assessments within 60 days, and the appeal to the board made within 60 days of the said notice gives the board jurisdiction to redetermine the asserted deficiencies, and under the provisions of section 278 (d) of the revenue act of 1926 providing that—

Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer—

the deficiencies as redetermined by the board may be collected at any time within six years from the date of the timely assessment.

15 Having found that the assessments here in question were made within the applicable periods of the statutes of limitations and that the board has jurisdiction to redetermine such deficiencies and the parties having agreed that the computation of such deficiencies has been correctly made, we must conclude that the deficiencies are as follows: for the fiscal year ended May 31, 1920, $2,887.95 and for the year ended May 31, 1921, $276.82.

Judgment will be entered for the respondent.

Now, August 7, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.] B. D. GAMBLE.
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Decision

Pursuant to the board's findings of fact and opinion, promulgated March 18, 1929, it is

Ordered and decided: That there are deficiencies of $2,887.95 and $276.82 for the fiscal years ended May 31, 1920, and May 31, 1921, respectively.

Entered Mar. 22, 1929.

(Signed) S. L. TRUSSELL.
Member, United States Board of Tax Appeals.

Now, August 7, 1929, the foregoing decision certified from the record as a true copy.

[SEAL.] B. D. GAMBLE.
Clerk, U. S. Board of Tax Appeals.

MVW

16 Before United States Board of Tax Appeals

Petition for review filed June 29, 1929

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Your petitioner respectfully shows:

1. Your petitioner is a corporation organized under the laws of the State of Georgia with principal office and place of business at Macon, Georgia.

2. By this proceeding petitioner is seeking a review by the United States Circuit Court of Appeals for the Fifth Circuit of a decision of the United States Board of Tax Appeals entered March 18, 1929, and order thereon redetermining deficiency in corporation income and profits taxes for the fiscal years ended May 31, 1920 and May 31, 1921 in the sums of $2,887.96 and $276.83, respectively.

3. The petitioner contended before the Board of Tax Appeals that more than five years had elapsed from the date the original legal returns were filed for the taxable year 1920 and more than four years for the taxable year 1921 and that therefore the assessment and the collection of the deficiencies asserted was barred by the statutory period of limitations properly applicable thereto. This the respondent denied.

4. The errors committed by the Board of Tax Appeals upon which petitioner relies as the basis of this proceeding are as follows:

(a) The board erred in holding that the assessment of the deficiencies was not barred by the statutory period of limitations properly applicable thereto.

(b) The board erred in failing to hold that the collection of the deficiencies is barred by the statutory period of limitation properly applicable thereto.

17 (c) Under the findings of fact the board erred in holding that petitioner is legally required to file its returns for the period under review upon the basis of the fiscal year, and that fiscal year returns were properly required.

(d) The board erred in holding that the statutory period of limitations upon assessment for the fiscal year 1920 did not begin to run until March 16, 1921, and for the fiscal year 1921 until March 16, 1922, and that the limitation periods did not expire in each year until the close of the day March 15, 1926.

(e) The board erred in affirming the determination of the commissioner that there is a deficiency in tax for the fiscal year 1920 in the sum of $2,887.96 and for the fiscal year 1921 in the sum of $276.83.

Wherefore, your petitioner prays that the United Circuit Court of Appeals for the Fifth Circuit review the action of the United States Board of Tax Appeals, reverse the decision thereof and direct that proper entry and order thereon be made by said board in favor of petitioner, and specifically determining that there is no deficiency

in corporation income and profits taxes, and your petitioner prays for such other and further relief as may to the court appear proper in the premises.

J. C. MURPHY,
Attorney for Petitioner.

[*Duly sworn to by J. C. Murphy; jurat omitted in printing.*]

18 Before United States Board of Tax Appeals

Notice of filing petition for review

To the Commissioner of Internal Revenue:

Your [you] are notified that petition for review of the decision and order in the above-stated case is this day being filed to the United States Circuit Court of Appeals, copy of said petition being hereto attached. No error is assigned in the admission or rejection of evidence and therefore no statement of evidence submitted to the board will be prepared by petitioner.

J. C. MURPHY,
Attorney for Petitioner.

Before United States Board of Tax Appeals

Acknowledgment of service

Due and legal service of the following-described documents in the above-stated case is acknowledged; other and further service is waived:

Petition for review by the United States Circuit Court of Appeals for the Fifth Circuit.

Notice of filing petition for review.

Præcipe.

[SEAL.]

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue and
Attorney for Respondent.

This 29th day of June, 1929.

Now, August 7, 1929, the foregoing petition for review, notice of filing, and acknowledgment of service thereof certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

19 Before United States Board of Tax Appeals

Præcipe for transcript of record

To the Clerk, U. S. Board of Tax Appeals:

You will please prepare within sixty days from the date of the filing of the petition for review in the above-entitled cause and transmit to the clerk of the United States Circuit Court of Appeals for the Fifth Circuit, certified copies of the following documents:

1. The docket entries of the proceeding before the board.
2. Petition of Willingham Loan & Trust Company.
3. Answer of Commissioner of Internal Revenue.
4. Findings of fact, opinion, and decision of the board entered March 18, 1929.
5. Order of redetermination by Board of Tax Appeals.
6. Petition for review by the United Circuit Court of Appeals for the Fifth Circuit.
7. Notice of filing petition for review.
8. Acknowledgment of service.
9. This præcipe.

20 The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United Circuit Court of Appeals for the Fifth Circuit.

This June 26, 1929.

J. C. MURPHY,
Attorney for Petitioner,
427 Hurt Bldg., Atlanta, Ga.

Now, August 7, 1929, the foregoing præcipe certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

21 [Minute entry of argument and submission, Oct. 8, 1929, omitted in printing.]

22 In United States Circuit Court of Appeals for the Fifth Circuit

No. 5690

WILLINGHAM LOAN AND TRUST COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Motion to substitute Robert H. Lucas, present Commissioner of Internal Revenue, for David H. Blair, resigned, filed October 8, 1929

Comes now the Attorney General by Helen R. Carloss, special assistant to the Attorney General, and suggesting to the court the

resignation of David H. Blair as Commissioner of Internal Revenue, moves that Robert H. Lucas, present Commissioner of Internal Revenue be substituted as party respondent in the above entitled cause.

(Signed) HELEN R. CARLOSS,
Special Assistant to the Attorney General.

23 In the United States Circuit Court of Appeals

[Title omitted.]

Order substituting Robert H. Lucas as party respondent, October 8, 1929

On consideration of the motion of the Attorney General, through Miss Helen Carloss, special assistant to the Attorney General, suggesting the resignation of David H. Blair, as Commissioner of Internal Revenue, and moving that Robert H. Lucas, present Commissioner of Internal Revenue be substituted as party respondent in the above entitled cause:

It is ordered that the said Robert H. Lucas, Commissioner of Internal Revenue, be substituted as party respondent in the above entitled cause.

24 In United States Circuit Court of Appeals, Fifth Circuit

No. 5690

WILLINGHAM LOAN AND TRUST COMPANY, PETITIONER

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals (District of Georgia)

J. C. Murphy for petitioner.

Sewall Key, Harvey R. Gamble, Helen R. Carloss, Spec. Assts. to the Attorney General, C. M. Charest, Gen. Counsel, Bureau of Int. Rev., John M. C. Hudson, Spec. Atty., Bureau of Int. Rev., for respondent.

Before WALKER, BRYAN, and FOSTER, *Circuit Judges*

Opinion filed November 22, 1929

FOSTER, *Circuit Judge:*

In this case it appears that petitioner kept its books on a monthly basis, taking off trial balances and dividing profits at the end of

each month, and closed the books on May 31st annually. However, they filed returns for income and profit taxes on the annual basis for the years 1919, 1920, and 1921, and prior years, using the
25 monthly trial balances for that purpose. The Commissioner of Internal Revenue required returns to be made on the fiscal year basis. This was done, petitioner filing returns on the basis of its fiscal years ending May 31st, 1920 and 1921. On March 15th, 1926, the commissioner made jeopardy assessments of deficiencies for those two years. Contending that the assessments were made after the statute of limitations had run, petitioner sought relief from the Board of Tax Appeals.

The board held that the statute began to run from the date of the filing of the last calendar year return covering the period of time included in the respective fiscal years, which was March 15th, 1921 for the year 1920, and March 15th, 1922 for the year 1921. We concur in this ruling. On the respective dates of the filing of the returns on the annual basis the commissioner had before him accurate data upon which to consider deficiencies and make assessments based on the fiscal years. This is not inconsistent with our ruling in Florsheim Bros. Dry Goods Co., Ltd., vs. United States, 29 F. (2d) 895, as in that case the taxpayer had first filed a tentative return in which the amount of taxes was estimated and the commissioner did no have sufficient data before him upon which to make an assessment until the complete return was filed.

However, the board held that the statutes of limitation applicable to the assessment, Rev. Act of 1918, 250 D; Rev. Act of 1921, 250 D; and Rev. Act of 1926, 277 (A) (2) and (3), would not begin to run until after the date of filing so that the commissioner had all of March 15th, 1926, in which to make the assessments. This,
26 we think, was error. In each of the statutes applicable the language with regard to assessments in substance is that deficiencies shall be determined and assessed by the commissioner within five or four years respectively after the return was due or was made. Taxing statutes are to be construed in favor of the taxpayer. The statutes should not be held to mean that limitation begins to run after the "day" or "date" upon which the return was due or was made. In this respect we have heretofore held, in the case of New York Life Ins. Co. vs. Bullock, 26 F. (2d) 666, that the rule with regard to computation of time is that, where it is to be made from a specific day, the first day is excluded, but where it runs from an event, the first day is to be included. We see no occasion to depart from the conclusion reached in the above cited case. Clearly, prescription ran from the event of filing and not from the day of filing. The assessments made on the 15th day of March, 1926, were one day too late.

The *The* petition is granted and the judgment is *Reversed*.

27 In United States Circuit Court of Appeals

No. 5690

WILLINGHAM LOAN AND TRUST COMPANY

versus

COMMISSIONER OF INTERNAL REVENUE

Judgment, Nov. 22, 1929

This cause came on to be heard on the petition of Willingham Loan and Trust Company for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that said petition be, and the same is hereby, granted, and that the judgment of the said United States Board of Tax Appeals be, and it is hereby, reversed.

28 In United States Circuit Court of Appeals

Motion for order staying mandate, filed December 16, 1929

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of the judgment herewith.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court within the three months' period provided by statute in that respect a petition for certiorari in this cause; that it is highly probable that such petition for certiorari will be filed; and that he believes it undesirable under such circumstances to have the mandate of this court issue in accordance with the general rules of this court.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

29 In United States Circuit Court of Appeals

Order staying mandate, Dec. 16, 1929

On consideration of the application of the respondent in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable respondent to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of three months from November 22nd,

1929, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 16th day of December, 1929.

(Signed) R. W. WALKER,
United States Circuit Judge.

30 [Clerk's certificate to foregoing transcript omitted in printing.]

31 Supreme Court of the United States

Order allowing certiorari filed April 14, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

32 (Indorsement on cover:) File No. 34814. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 683. Robert H. Lucas, Commissioner of Internal Revenue, Petitioner, vs. Willingham Loan and Trust Company. Petition for writ of certiorari and exhibit thereto. Filed February 21, 1930. File No. 34814.

U. S. GOVERNMENT PRINTING OFFICE: 1930